No. 12802

United States
COURT OF APPEALS
for the Ninth Circuit

M AND M WOOD WORKING COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

On Petition to Set Aside Cease and Desist Order of Federal Trade Commission.

BRIEF FOR PETITIONER

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AUTHORITIES

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JURISDICTION OF THIS COURT

This cause concerns the review of an order of the Federal Trade Commission, of which this Court was granted jurisdiction by 15 U.S.C.A., Sec. 45(c).

The Federal Trade Commission began the proceedings by issuing its complaint (R. 5) on March 1, 1948. On May 19, 1949, the Commission issued an amended

complaint (R. 35). On June 8, 1949, this petitioner filed its answer (R. 68) to the amended complaint.

No evidence, other than the pleadings, were offered or received by the Trial Examiner, and the proceedings before him were closed on September 30, 1949 (R. 90).

On October 20, 1950, the Commission made certain findings of fact and conclusions (R. 96) and issued an order (R. 122) directing the petitioner and others to cease and desist from certain practices therein specified. On November 6, 1950, the petitioner was served with a copy of the findings of fact, conclusions and order, which were a final decision by the Commission.

Pursuant to 15 U.S.C.A., Sec. 45(c), this petitioner on December 29, 1950, filed in this Court a written petition (R. 235a), praying that the order of the Commission be set aside. It served the Commission (R. 235d) with a copy of the petition, and the Commission forthwith certified and filed in this Court a transcript of the entire record.

Both the petition (R. 235a) and the Commission's findings (R. 96) recite that this petitioner is an Oregon corporation; that its principal place of business is in Oregon; and that it does business in the States of Oregon, Washington and California. All of the acts, practices and methods of competition, which were used by the petitioner and to which the Commission had reference in its findings, conclusions and order, occurred in one or more of those three states.

STATEMENT OF THE CASE

During a substantial part of the period between May, 1935, and August, 1941, this petitioner and some other members of the plywood industry had an agreement in restraint of trade.

There is no evidence relating to or concerning the period of more than six years between August, 1941, and the issuance of the original complaint on March 1, 1948, or any period of time subsequent thereto.

Neither this petitioner nor any of the other members of the industry offered any evidence that they had discontinued their unlawful activities.

The Commission offered no evidence that the petitioner or others had continued their unlawful activities. At the argument before the Commission, its attention was called to certain telegrams terminating certain patent license agreements. An unresolved dispute arose as to whether those license agreements were illegal. No showing was made that the agreements were being used, or, if so, the extent thereof. The most claimed by counsel for the Commission was that they might have given the Commission reasonable cause to make an investigation. There was no showing that the Commission deemed the termination of the agreements reasonable cause to make an investigation or that the Commission made an investigation. All we know is that the Commission offered no evidence, if it had any; that it did not reopen the proceedings or start a new proceeding. It carried its burden of proof to 1941, and did not thereafter continue.

As a result, the gap of ten years must be filled with a substitute for evidence. Commissioner Mason thought (R. 130) that proof of an unlawful activity in 1915, without more, would justify a cease and desist order in 1951. In other words, it is reasonable to infer from the fact that this petitioner was committing unlawful acts prior to 1941 that it was committing the same acts in 1950—or that it was likely that it would commit the acts after 1950. This petitioner argues that the inferences are unreasonable and that a cease and desist order based thereon is such an arbitrary exercise of the Commission's authority that it should be set aside.

The question, therefore, is whether the Commission had any reasonable basis to infer, from the fact that unlawful activities occurred prior to 1941, that unlawful events were occurring in 1950 or were likely to occur after 1950.

SPECIFICATION OF ERRORS

There is only one question in this case. It was raised by two separate specifications of error stated in this petitioner's points (R. 227), as follows:

"I.

"The Federal Trade Commission erred in finding, in Paragraph Nine of its Findings of Fact dated October 20, 1950, that the capacity, tendency and results of an understanding, agreement, combination, conspiracy and planned common course of action, and the acts and things done thereunder and pursuant thereto, 'now are'

as set forth in said findings, because there was no evidence offered or received that such understanding, agreement, combination, conspiracy and planned common course of action, or the acts and things done thereunder and pursuant thereto, existed or occurred, or were threatened or likely to exist or occur, or had any capacity, tendency or results or other continuing effect, at any time after August 1, 1941.

"II.

"The Federal Trade Commission erred in issuing the cease and desist order dated October 20, 1950, or any cease and desist order, because there was no evidence offered or received that an understanding, agreement, combination, conspiracy and planned common course of action, or the acts and things done thereunder and pursuant thereto, existed, occurred, or were threatened or likely to exist or occur, or had any tendency, capacity or results or other continuing effect, at any time after August 1, 1941. Due to the long lapse of time between August 1, 1941, and the initiation of proceedings by the respondent on March 1, 1948, no cease and desist order of any kind should have been issued."

ARGUMENT

The essence of the petitioner's objection to the Commission's findings and order is that there is not reasonable cause for imposing upon the plywood industry an enforcement order, with its penalties of contempt and action for damages. The possibility of unlawful conduct

at some unknown time in the future is not great enough to warrant the imposition of a club.

The Commission's primary function is to stop unlawful methods of competition before they have their undesirable results. It must, therefore, concern itself with prophecies of future events and it has been given a wide discretion in making its expert decisions as to the probability of future conduct. See *Galter v. Federal Trade Commission*, 186 F. (2d) 810 (CA 7, 1951). Conversely, it may not exercise its discretion in an unreasonable or arbitrary manner. If it makes a decision based upon evidence or a substitute therefore with which reasonable men could not agree, its decision will be reversed.

This case seems to involve a conflict of presumptions. There being no evidence in the record after 1941, the Commission seems to rely upon a presumption that unlawful activity, once shown, continues. This petitioner and other members of the industry seem to rely upon a presumption of change—that a condition existing more than ten years ago must have been changed, if it has not been completely abandoned.

This petitioner denied that any unlawful activity or the threat thereof existed after 1941 (R. 68). With this knowledge, the Commission failed to proceed, and presented no evidence either of a continuance or of a threat to continue, but chose rather to rely upon an abstract inference. In view of the uncontested denial of the petitioner and the long lapse of time, with its consequent natural changes, especially those created by a war, sub-

sequent inflation and the threat of a new war, an inference of continuance or threat thereof is clearly unreasonable.

A cease and desist order, like an injunction, should only be issued when there is a real and substantial threat of the continuance or occurrence of unlawful activity. *Federal Trade Commission v. Civil Service Training Bureau,* 79 F. (2d) 113 (CCA 6, 1935); *L. B. Silver Co. v. Federal Trade Commission,* 292 Fed. 752 (CCA 6). There is no such threat in this case. The most that the Commission can say now—or could say in 1948 when the original complaint was filed, or in 1950 when the findings and the order were made—is that at some unknown time in the future the economic conditions may be such and the circumstances of the plywood industry may be such that this petitioner and other members of the industry may violate the law and at that time it would be convenient to have an enforcement order hanging over its head. Convenience to the Commission does not constitute a threat nor is it a lawful cause to justify its control of an industry by injunction.

Respectfully submitted,

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